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No. 501

IN THE

Supreme Court of the United States

October Term, 1965

DIVISION NO. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,

Petitioner

v.

M. K. & O. TRANSIT LINES, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

DIVISION NO. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,

Petitioner

v.

M. K. & O. TRANSIT LINES, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Appendix A, *infra*, p. 1a) is not reported officially; it is reported unofficially at 53 LRRM 2662.

The opinion of the District Court (Appendix B, *infra* p. 9a) is not reported officially; it is reported unofficially at 51 LRRM 2470.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the Court of Appeals was entered on May 31, 1963. The order of the Court denying a petition for rehearing *en banc* was entered July 17, 1963.

The jurisdiction of the District Court was invoked under 29 U.S.C. § 185.

QUESTIONS PRESENTED

1. Is an agreement to arbitrate the terms of a new collective bargaining agreement specifically enforceable in the Federal Courts under Section 301 of the Labor Management Relations Act?

2. Under Section 301 of the Labor Management Relations Act does an agreement by an employer to arbitrate the terms of a new collective bargaining agreement survive the anticipatory repudiation by a union of the contract in which that agreement to arbitrate is embodied?[1]

STATUTORY PROVISION INVOLVED

The statutory provision involved in this cause, Section 301(a) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. 185(a), is as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

By this petition, Petitioner seeks to have reviewed the judgment of the United States Court of Appeals reversing

[1] If this petition is granted, in addition to the two questions presented, Petitioner intends to argue that in fact the Petitioner did not repudiate the contract in question. See *infra* p. 11 n. 12.

an order of the District Court which had directed Respondent, M. K. & O. Transit Lines, Inc., to arbitrate a labor dispute with Petitioner, which dispute involved the terms of a new collective bargaining agreement.

Respondent's agreement to arbitrate is found in a collective bargaining agreement with Petitioner which provides for the wages, hours and working conditions of the bus drivers and maintenance employees employed by Respondent in the operation of a public transportation system in Tulsa, Oklahoma. Article 8 of the bargaining agreement specifically states the intent of the parties to resolve by arbitration any dispute over new or changed provisions "for the contract year following the year covered by this Agreement or any extension of it."

The chronology of events leading to this lawsuit follows:

April 27, 1962—Petitioner, in accordance with the terms of the collective bargaining agreement and in accordance with the requirements of Section 8(d) of the Labor Management Relations Act, 29 U.S.C. § 158(d), notified Respondent of its desire to negotiate changes, additions, modifications and deletions in the agreement which covered the period up to June 30, 1962, so that any changes agreed on could be made effective July 1, 1962.[2] Thereafter, the parties met and negotiated over the Petitioner's notice.

[2] The letter dated April 27, 1962 stated:

"As provided in the existing Agreement by and between the M. K. & O. Transit Lines, Inc., and Division Number 892 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, and in accordance with the existing laws this is the official notice of this Division's desire to negotiate changes, additions, modifications, deletions and whatever the case may be in the terms of a new contract by and between M. K. & O. Transit Lines, Inc., and this Division.

"In the event that no agreement has been reached by midnight of June 30, 1962, and if arbitration has not been agreed upon this will serve due notice that the entire contract now in effect is to be terminated as of midnight June 30, 1962.

"The Officers of this Division are ready and willing to meet and treat with the Representatives of the Company for the purpose of negotiating a new contract on a date and at a place that is agreeable to both parties."

June 20, 1962—Negotiations having failed to produce a settlement, Petitioner, in accordance with Article 7 of the collective bargaining agreement, gave notice to the Company of its demand for arbitration of the issues remaining in dispute.[3]

June 25, 1962—Respondent refused Petitioner's request to submit the dispute to arbitration and advised that it was under no contractual obligation to arbitrate.

June 29, 1962, one day prior to the expiration date of the agreement—Petitioner filed a complaint in the United States District Court for the Northern District of Oklahoma demanding specific performance of the agreement to arbitrate as provided in the collective bargaining agreement.[4]

Motions for Summary Judgment were filed by both parties. On November 8, 1962 the District Court issued an order granting the Petitioner's Motion for Summary Judgment, and ordered Respondent to proceed to arbitration. In so doing, the District Court found that it had jurisdiction to determine the controversy by virtue of Section 301 of the Labor Management Relations Act. It held that Respondent had agreed to arbitrate the labor dispute alleged by Petitioner. It found:

"This arbitration clause is clear and unambiguous; at

[3] Article 7 provides in pertinent part:

"All grievances, disputes and differences between the UNION and COMPANY including changes, additions and modifications to any agreement which cannot be resolved by negotiations between the two parties, shall be determined by arbitration as hereinafter provided: . . ."

[4] Petitioner was precluded from resorting to strike action to enforce the Respondent's commitment to arbitrate. Article 8 of the agreement provides:

"It is agreed by the parties that there shall be no strike by the ASSOCIATION, nor lock-out by the COMPANY during the life of this Agreement. Since it is likewise the intent of the parties that arbitration will be resorted to in the event no agreement on grievances, new or changed provisions is reached for the contract year following the year covered by this Agreement or any extension of it, it is agreed that during such periods of negotiations or arbitration proceedings there will be no strike or lock-out."

least, the parties to this action do not contend that there is any ambiguity in the clause. The Court must assume that the parties knew the meaning and purport of the language used in this Article. To me it simply means that if a dispute arises as to any grievance or with respect to changes, additions or modifications to the contract, the parties must submit to arbitration if they cannot otherwise resolve their differences by negotiations."

In response to Respondent's contention that the Court had no jurisdiction to order arbitration of the terms of a new contract under the decision in *Boston Printing Pressmen's Union* v. *Potter Press*, 141 F. Supp. 553 (D. Mass. 1956), *aff'd*, 241 F.2d 787 (1st Cir.), *cert. denied*, 355 U.S. 817 (1957), the District Court found that case "not in point and . . . at odds with the rulings of the Supreme Court" in *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers of America* v. *Warrier & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); and *United Steelworkers of America* v. *Enterprise Wheel and Car Co.*, 363 U.S. 593 (1960).[5]

On appeal to the United States Court of Appeals for the Tenth Circuit, the Court of Appeals reversed the judgment of the District Court. A petition for rehearing was denied. It is from this judgment that Petitioner seeks review.

REASONS FOR GRANTING THE WRIT

1. This Case Presents A Question Under Section 301 Of The Labor Management Relations Act Of The Enforcement Of An Agreement To Arbitrate A New Contract Which Is Critical To The Administration Of The Act And Upon Which The Federal Courts Have Expressed A Contrariety Of Views.

[5] The District Court also held that the Petitioner's right to demand arbitration had not expired by reason of the notice of April 27, 1962; that the contract was still in full force and effect when the Petitioner's demand for arbitration was made and when the Respondent refused to arbitrate; and that the right to arbitration does not expire with the expiration of the collective bargaining agreement.

The primary issue in this case is essentially simple. Respondent gave its solemn undertaking to submit jointly with Petitioner to arbitration, in the event agreement could not be reached on new or changed provisions of a collective bargaining agreement to be effective July 1, 1962. Respondent has refused to honor that undertaking and has taken the position that notwithstanding the arbitration provisions of the collective bargaining agreement, it will not arbitrate and cannot be compelled to do so by the Federal Courts under Section 301 of the Labor Management Relations Act.

In *Textile Workers of America* v. *Lincoln Mills*, 353 U.S. 448 (1957), this Court held, in the context of a labor dispute involving certain grievances between a union and a company, that an agreement to arbitrate is specifically enforceable as a matter of federal right in the Federal Courts under Section 301 of the Labor Management Relations Act. The Court found that "industrial peace can be best obtained" only by enforcement of such agreements to arbitrate. 353 U.S. at 455. The Court further admonished that it was encumbent upon the Federal Courts to fashion a body of substantive law from the policy of our national labor laws. 353 U.S. at 456.

Three years later, in the Steelworkers "trilogy," *United Steelworkers of America* v. *Warrier & Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), and *United Steelworkers of America* v. *Enterprise Wheel and Car Co.*, 363 U.S. 593 (1960), the role of the federal judiciary in cases involving the enforcement of agreements to arbitrate labor disputes under Section 301 was further defined. The court, in establishing the confines of legitimate involvement by the Federal Courts in those three cases, and in expanding upon the reasons for imposing sanctions behind agreements to arbitrate labor disputes, placed great emphasis upon the Congressional intent of promoting peaceful resolution of such disputes. In *American Manufacturing Co.*, the Court stated:

> "Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. § 173 (d), states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . . .' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." 363 U.S. at 566.

See also *Drake Bakeries, Inc.* v. *Local 50*, 370 U.S. 254, 263-264 (1962).

Until the instant case, the lower Federal Courts, apparently unmindful of the adverse effects of their decisions upon peaceful resolution of labor-management disputes,[6] followed the decision in the *Potter Press* case wherein Judge Wyzanski had refused to order a company to submit to arbitration the terms of a new contract.[7] Judge Wyzanski had been moved by three primary considerations. First, that such arbitration would be "prospective or quasi-legislative" and the "present United States arbitration statute . . . is

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[6] "It is unfortunate that a refusal by the courts to enforce arbitration of the nonjusticiable dispute is tantamount to their decreeing industrial strife. These are the most vexing disputes—the ones over which unions are most likely to strike.

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"Disputes, strikes, and other forms of labor-management warfare are bound to occur in a free-enterprise society, and as one writer has observed, '[T]he best technique of reducing their number is the creation of labor conditions which satisfy both parties to the greatest possible extent. A further condition of smoothly functioning labor-management relations is the unconditional acknowledgment of all contractual obligations.' Combining this thought with the similarly basic principle that in 'true' arbitration the parties are free to select their own arbitrator, there seems to be no reason why the parties to a labor dispute should not be compelled to honor their voluntary commitments to arbitrate a dispute over the terms of a new contract, or any other nonjusticiable matter." Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 251 (1950).

[7] See, *e.g.*, In Re *Valencia Bart Express, Inc.*, 199 F. Supp. 103 (D.P.R. 1961); *Couch* v. *Prescolite Mfg. Corp.*, 191 F. Supp. 737 (W.D. Ark. 1961).

concerned only with the enforcement of quasi-judicial awards . . . " 141 F.Supp. at 554, 558. Second, the Court had "no information as to whether it is common in labor contracts to have such quasi-legislative provisions." Third, it was "undesirable [for the Federal courts] to jump into what may be a bottomless pit of disputes over future working conditions." 141 F.Supp. at 557.

The reasons relied upon by Judge Wyzanski in *Potter Press* are, in the light of the decisions of the Supreme Court in *Lincoln Mills* and the *Steelworkers* trilogy, and in the light of the suffusion of information now available respecting the usage and acceptance of new contract arbitration, no longer valid and the District Court below properly refused to follow *Potter Press*.

Since the decision of the District Court in the instant case another Federal Court has similarly refused to follow *Potter Press*. See *Greater Kansas City Laborers* v. *Builders Association*, 213 F.Supp. 429 (W.D. Mo. 1963), *modified*, 52 LRRM 2755, *original decision reinstated*, 52 LRRM 2913.

The critical importance of the question presented to the future administration of the Labor Management Relations Act, and to arbitration of the terms of a new agreement as a peaceful substitute for economic warfare, is pointed up by the occurrence of such arbitration clauses in collective bargaining contracts in American industry today.[8] As a matter

[8] In 1963 alone, collective bargaining agreements affecting 1.2 million workers are due to expire. Ward, *Major Agreement Expirations and Reopenings in 1963*, 12 Monthly Labor Rev. 1333 (1962). An earlier study of the Bureau of National Affairs, Inc., reports that in the labor agreements analyzed, recourse to arbitration following contract deadlocks upon expiration is found in 2% of the contracts generally, and in 8% in non-manufacturing industries, with a much larger proportion in utility contracts. The Bureau also reports that among contracts providing for mid-term wage reopeners, 10% provide for arbitration of any deadlocked wage dispute. B.N.A., Collective Bargaining Negotiations and Contracts, 36:3, 93:2.

Most recently the Congress provided statutory sanction to binding arbitration of new contract provisions in the railroad industry, which arbitration had been agreed to by the parties except that they had been unable to agree upon the terms and procedures of an arbi-

of fact, arbitration of the terms of a new collective bargaining agreement is not a new or unique device for avoiding industrial strife. The Amalgamated Association, of which Petitioner is a local union, has for more than fifty years had as a policy voluntary arbitration of all labor disputes when settlement through negotiation was impossible. If a local division is unable to reach a settlement of a labor dispute through negotiation, it is required by the constitution of the Amalgamated Association, the predominant union in the United States in the field of transportation of passengers by bus, street car, trolley coach, to offer to the company to submit the dispute to arbitration. No strike by a local division will be sanctioned unless it has proffered arbitration of the dispute.[9]

New contract arbitration has been determined to be a useful device in reducing the losses incident to work stoppage in other industries and by other unions. Morrison Handsaker has reported on major contract disputes during the last four years in the newspaper industry, railroad industry, glass manufacturing industry, and airline industry, which were settled by submission of the key issues to an impartial Board of Arbitration.[10] Typical cases involving

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tration agreement. Public Law 88-108, August 28, 1963. In the strike-plagued airline industry, a major step toward peaceful resolution of new contract disputes was taken by the inclusion of provisions requiring the submission to arbitration of disputes over new contract terms by the very large carrier Pan American World Airways with several of the unions representing its employees. Bureau of National Affairs, Inc., What's New in Collective Bargaining, No. 471, June 21, 1963, and No. 473, July 19, 1963.

[9] Alfred Kuhn, Arbitration in Transit 5 (1954). See also Edwin M. Witte, Historical Survey of Labor Arbitration *passim* (1952), recounting the early developments and incidents of contract arbitration, dating back to the 19th century, including the prominent role assumed by the Amalgamated Association in this development, dating from 1891.

[10] See Handsaker, *Changing Role of Arbitration and Changing Issues*, New York University 14th Annual Conference on Labor 183, 186-188 (1961). Earlier studies of arbitration of the terms of new agreements appear in Irving Bernstein, Arbitration of Wages 15 (1954) (209 reported awards in arbitration of future wages between 1945-1950); for other examples of arbitration of the terms of

the arbitration of some or all of the terms of a new collective bargaining agreement are found also in the Labor Arbitration Reports. See *e.g.*, In Re *Sacramento Wholesale Bakers' Association*, 20 LAR 106 (1952) (wages); In Re *Chatham Electronics*, 37 LAR 3 (1961) (holidays).[11]

The continued acceptance of the *Potter Press* doctrine by the Federal Courts would threaten this acceptance and usage of new contract arbitration. Absent the sanction of a Federal Court order to enforce such agreements, the Congressional policy enunciated in Sections 201-204 of the Labor Management Relations Act, 29 U.S.C. §§ 171-174, of promoting industrial peace through negotiation, conciliation, mediation and arbitration, will be completely frustrated. To permit one party to a new contract arbitration agreement to ignore and violate such agreement with impunity, is to permit the destruction of a very substantial element of the structure of voluntary and peaceful settlement of such labor disputes.

This Court should grant the petition in order to resolve the conflicting views of the Federal Courts on the important question of the power to compel specific performance of agreements to arbitrate the terms of a new labor contract.

II. The Decision Of The Court Below Conflicts With The Principles Of Drake Bakeries, Inc. v. Local 50, 370 U.S. 254 (1962).

Assuming for the purposes of this petition, that the Petitioner's letter of April 27 was an anticipatory repudiation of the labor agreement as found by the Court below, and that

a new contract in the airline and railroad industry; see 28th Annual Report of the National Mediation Board 35-42 (1962); 27th Annual Report of the National Mediation Board 41-47 (1961); and 26th Annual Report of the National Mediation Board 35-41 (1960).

[11] The specific language of the agreement to arbitrate the terms of a new contract varies. Compare the language of the agreement between the International Brotherhood of Electrical Workers and the San Diego Gas and Electric Company, with the language of the agreement between the Longshoremens Union and the Pacific Maritime Association. Bureau of National Affairs, Inc., Collective Bargaining Negotiations and Contracts, 51:269 (1963).

this repudiation was not retracted before the Respondent altered its position in reliance thereon, the failure of the Court below to order the Respondent to arbitrate conflicts with *Drake Bakeries, Inc.* v. *Local 50*, 370 U.S. 254 (1962).[12]

In *Drake* the company had brought an action under Section 301 of the Labor Management Relations Act, alleging the union had violated the no-strike clause of the labor agreement. The Court of Appeals affirmed the judgment of the District Court granting the union's motion to stay the action pending arbitration. On petition to the Supreme Court, the company argued that the union's violation of the no-strike clause was a breach or repudiation of the agreement and that it was excused from arbitrating upon "theories of waiver, estoppel, or otherwise." 370 U.S. at 262. This contention was rejected by the Court. The Court noted:

> "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach; and in determining whether one party has so repudiated his

[12] The Court of Appeals decision, which can only be read as construing the Petitioner's letter as an anticipatory repudiation of the agreement, is plainly erroneous. The Petitioner's letter did not terminate the agreement; both Petitioner and Respondent continued to observe the agreement after the letter was received. See *Local 181, Int'l Union of Operating Engineers* v. *Dahlem Construction Co.*, 193 F.2d 470 (6th Cir. 1961). Nor was the April 27 letter an anticipatory repudiation of the agreement. *Mobley* v. *New York Life Insurance Co.*, 295 U.S. 632, 638 (1935); *Placid Oil Co.* v. *Humphrey*, 244 F.2d 184 (5th Cir. 1957); *McCloskey & Co.* v. *Minweld Steel Co.*, 220 F.2d 101 (3rd Cir. 1955), *Brown Paper Mill Co.* v. *Irvin*, 146 F.2d 232 (8th Cir. 1944). Moreover, the Court was in error in failing to find that the Petitioner had effectively "retracted" any anticipatory repudiation, assuming *arguendo* such was the consequence of the Petitioner's letter, before the Respondent elected to abandon the labor agreement. See *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons*, 62 F.2d 1004, 1006 (2d Cir. 1933); *Pasquel* v. *Owens*, 186 F.2d 263 (8th Cir. 1950); *Cessna Aircraft Corp.* v. *Aviation, Inc.*, 243 F.2d 815 (10th Cir. 1951); *Bu-Vi-Bar Petroleum Co.* v. *Krow*, 40 F.2d 488 (10th Cir. 1930); and *Refrigeradora Del Noroeste* v. *Appelbaum*, 138 F. Supp. 354 (N.D. Ill. 1956), *rev'd in part*, 248 F.2d 858 (7th Cir. 1957), *cert denied*, 356 U.S. 901 (1958). If this petition is granted, Petitioner intends to argue the error of the Court of Appeals in its decision relating to each of these points.

promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important." 370 U.S. at 262-63 (Footnotes omitted)

The Court concluded that, inasmuch as arbitration where agreed to by the parties was the preferred method of settling labor disputes, and because the stabilizing influences of the labor agreement could be given effect by ordering arbitration, the District Court had not erred.

The Court below, in excusing Respondent from its agreement to arbitrate, ignored this holding of the Supreme Court in *Drake Bakeries*, and failed to apply the doctrine enunciated therein, a doctrine generally recognized as indicated by the cases cited at 370 U.S. at 262 n.9,[13] that a repudiator may still compel arbitration of any dispute arising under the repudiated agreement.

The conflict between the Court below and the principle stated in *Drake Bakeries*, points up the importance of the survival of the commitment to arbitrate beyond an anticipatory repudiation of the agreement in which the commitment to arbitrate is found. Any other rule would foster anticipatory breach of unimportant elements of an agreement whenever opportune in order to evade the agreement to arbitrate. The Petitioner's letter of April 27, 1962, filed in accordance with Section 8(d) of the Labor Management Relations Act, wherein the Petitioner set forth its desire to negotiate modifications in the soon-to-expire agreement or to submit to arbitration any unresolved issues, was less a repudiation of the arbitration agreement than the violation of the no-strike clause by the union in *Drake Bakeries*. The salutary objective of labor peace can only be realized here by enforcement of the solemn commitment to arbitrate.

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[13] In addition to the cases cited, see also In re *Utility Oil Co.*, 69 F.2d 524 (2nd Cir.), *cert. denied*, 292 U.S. 655 (1934); *Porto Rico Lighterage Co.* v. *Marte Cia. Nav. S.A.*, 119 F. Supp. 366 (S.D. N.Y. 1953); *American Locomotive Co.* v. *Chemical Research Corp.*, 171 F.2d 115, 120 (6th Cir.) (dictum), *cert denied*, 336 U.S. 909 (1949); *DeLillo Construction Co.* v. *Lizza & Sons, Inc.*, 7 N.Y.2d 108, 195 N.Y.S. 2d 825 (1959); Annot., 3 A.L.R. 2d 383; Corbin on Contracts § 1443.

The Court should grant the petition in order to resolve the conflict between the decision below and the decision in *Drake Bakeries* on the critical question of whether the commitment to arbitrate survives repudiation.

CONCLUSION

For the reasons stated herein, this petition should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

TENTH CIRCUIT

No. 7237—March, 1963, Term

M. K. & O. TRANSIT LINES, INC.,

Appellant,

v.

DIVISION NO. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,

Appellee.

Before:

PICKETT and SETH, *United States Circuit Judges*, and CHRISTENSEN, *United States District Judge*.

CHRISTENSEN, *District Judge:*

This is an appeal by an employer of labor, M. K. & O. Transit Lines, Inc., from an order of the district court requiring it to proceed to the arbitration of the terms of a new contract following the termination by the plaintiff union of an existing collective bargaining agreement, the trial court having denied the employer's motion for summary judgment and granted the union's motion for summary judgment. The case involves the interpretation of the collective bargaining agreement between the parties and touches upon the reach of Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C.A. § 185(a).

On the 24th of June, 1959, the parties entered into a collective bargaining agreement to be effective from July 1, 1959, to June 30, 1962, both inclusive, and from year to year

thereafter, except that at the expiration of the contract term or any renewal thereof either party might terminate the agreement by giving notice to the other party of its intention to terminate or to negotiate changes.[1] The contract further provided that all grievances, disputes and differences between the union and the company, including changes, additions and modifications to any agreement which could not be resolved by negotiations between the parties, should be determined by arbitration as therein provided.

In a letter dated April 27, 1962, the union, through its president, called upon the company to negotiate a new contract and then stated:

> "In the event that no agreement has been reached by midnight of June 30, 1962, and if arbitration has not been agreed upon this will also serve due notice that the entire contract now in effect is to be terminated as of midnight June 30, 1962."

No agreement was reached by the parties prior to June 30 with respect to the terms of any new agreement or concern-

[1] Article 43 dealing with the duration of the agreement reads: "SECTION 1. This Agreement shall be in effect from July 1, 1959 to June 30, 1962, both inclusive, and from year to year thereafter, except that at the expiration of the contract term or any renewal thereof either party may terminate the Agreement by giving notice to the other party of its intentions to terminate the Agreement or to negotiate changes in its terms. Notice of the intention of either party to terminate the contract or negotiate changes in its terms shall be in writing and be delivered to the other party not more than ninety (90) and not less than sixty (60) days before the expiration of the contract term of any renewal thereof. If such notice is given by either party, it shall also contain an offer to meet and confer with the other party for the purpose of negotiating a new contract.

"SECTION 2. If no agreement shall have been reached by the parties within thirty (30) days after such notice, the Federal Mediation and Conciliation Service, and any state agency established to mediate and conciliate disputes within the state, shall be notified of the existence of a dispute, all as provided in sub-section (d) of Section 8 of Labor-Management Relations Act, 1947.

"SECTION 3. The parties hereto agree to meet at least 15 days prior to the anniversary date and continue in negotiations without interruption until the contract is completed, or until arbitration has been agreed upon."

ing arbitration, although after serving this notice of termination the union presented a demand for arbitration of the conditions of a new term.

The trial court held that the union "had not terminated" the labor agreement by the letter of April 27, 1962, that the agreement required the employer to arbitrate the conditions of a new contract to be effective after June 30, 1962 and that Section 301 of the Labor-Management Relations Act beyond grievances under the old contract, vested the court with jurisdiction and authority to arbitrate such new conditions. (Sic) Judgment was entered ordering the employer to proceed within ten days to arbitration in accordance with the court's decision.

The employer-appellant seeks reversal upon the grounds that the trial court erred (1) in interpreting the contract to indicate an intent to arbitrate new conditions for an additional term rather than only grievances or modifications with reference to the existing term; (2) in holding, even though the contract should be considered to evidence such intent, that the court had jurisdiction to compel defendant to submit to the arbitration of plaintiff's demands for the provisions of a new contract and (3) in holding that the contract was not terminated so as to bar such arbitration of new conditions in any event.

We believe it to have been the manifest intention of the parties that there should be arbitration of demands for the provisions of a new contract under the proper conditions. Clearly it was contemplated that, in the absence of notice of termination, the basic contract should continue from year to year. Article 43 provided in effect that notice of the intention of either party to negotiate changes in its terms for the succeeding year should be given in writing within the period required for notice of termination. Article 7, Section 1, required all additions and modifications, as well as changes, to be arbitrated. Appellant's contention that this obligation to arbitrate did not refer to changes for a re-

newed period of the contract appears precluded by Article 8, Section 1, reading in part:

> "It is agreed by the parties that there shall be no strike by the ASSOCIATION, nor lock-out by the COMPANY during the life of this Agreement. Since it is likewise the intent of the parties that arbitration will be resorted to in the event no agreement on grievances, new or changed provisions is reached for the contract year following the year covered by this Agreement or any extension of it, it is agreed that during such periods of negotiations or arbitration proceedings there will be no strike or lock-out."

Even though we believe that the parties contemplated that there might be arbitration of the conditions of a new contract, we do not reach the question of the court's authority or jurisdiction to require such arbitration. It may well be on the latter question that the rationale of the decision in the *Potter Press* case [2] should be reappraised in the light of subsequent decisions of the Supreme Court.[3] Our resolution of this important problem, however, should await a case in which it is squarely presented, and it is not squarely presented in this case. Indeed, it is not presented here at all, for the renewable term of the contract in connection with

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[2] Judge Wyzanski, in *Boston Printing Pressmen's Union* v. *Potter Press*, 141 F.Supp. 553 (1956), aff'd. 241 F.2 787 (1 Cir. 1957), cert. denied 355 U.S. 817, 78 S.Ct. 21, 2 L.Ed.2 34, after some hesitation, held that the United States' arbitration statute, in the light of Section 301 of the Labor-Management Relations Act, was concerned only with the enforcement of quasi-judicial awards directed at the ascertainment of facts of a past controversy and at the prescription of recoverable damages or other suitable awards for "that which had been broken, not for that which was to be built." See also *Couch* vs. *Prescolite Manufacturing Corporation*, 191 F.Supp. 737 (D.C.W.D. Arkansas, 1961).

[3] *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2 972 (1957); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2 1409 (1960); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2 1403 (1960); *Steelworkers* v. *Enterprise*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2 1424 (1960); *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, 82 S.Ct. 541, 7 L.Ed.2 503 (1962).

which it might have arisen was foreclosed unequivocally and effectually by the union's notice of termination.

It is not unusual in a contract establishing an initial term with automatic renewals to incorporate a provision authorizing either party to preclude a renewal by giving notice within a stated time. Such power reserved to both parties is certainly within ordinary contractual powers under general law. The Labor-Management Relations Act confirms it as to collective bargaining contracts.[4] The subsequent efforts to arrive at an agreement having failed, the termination notice should be given effect.[5]

While the union now seeks to dismiss the letter of termination as perhaps an indiscreet but meaningless gesture, no one has questioned that the president of the union who wrote the letter had authority to act for the union pursuant to the contract. Nor can it be questioned reasonably that he did so act to terminate the contract on behalf of the union. The notice was given within the time and in a manner consistent with both the contract of the parties and the Labor-Management Relations Act. There could have been reasons then valid for so doing. The union thus could have hoped to avoid the risk of being in the very position it asserts the employer is in now—being bound to arbitrate a future contract as a substitute for the collective bargaining process. Be this as it may, by terminating the contract as it had the right to do, the union relieved itself of the consequences

[4] 29 U.S.C.A. § 158 provides in part as follows: "*Provided*, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty-days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification; . . ."

[5] *Paterson Parchment P. Co. v. International Brotherhood*, 191 F.2 252 (3d Cir. 1951).

that would have resulted if the collective bargaining agreement had not been terminated. It also relieved the employer of those consequences.

If in the letter of April 27 demand simply had been made for the formulation of new conditions during the succeeding period, a contemporaneous or subsequent demand for arbitration, either before the expiration of the old term or during the new term, would have been appropriate, and would have squarely raised the question of whether arbitration of such new conditions could be compelled under Section 301. However, the union apparently did not wish to permit the old contract to continue in effect subject to the arbitration of new conditions. Its express purpose, within the powers reserved to it in the contract itself, was to terminate the agreement effective June 30, 1962, if new conditions or arbitration had not been agreed upon theretofore.

The cases cited by the union to support its claim that the obligation of arbitration survived the notice of termination are not in point. In those cases the sustained arbitration was with reference to accrued though continuing rights under the terminated agreement and did not concern the terms of any new agreement.[6]

The renewal of the contract having been foreclosed by an effective notice of termination, there was nothing to support arbitration proceedings in reference to the terms of the renewal in the absence of an agreement broad enough to justify the submission of the very question of termination to arbitration. No one contends that we have such an agreement here or that arbitration of the question of termination is not clearly precluded by the agreement between the parties.[7] In fact the case was presented by appellant both

[6] See for example *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 168 F. Supp. 308 (1958), modified and remanded, 269 F.2 327 (4th Cir. 1959), aff'd with modifications, 363 U. S. 593, 80 S.Ct. 1358, 4 L.Ed.2 1424 (1960); and *General Tire & Rubber Co.* v. *Local No. 512, etc.*, 191 F. Supp. 911, (D.C.R.I. 1961), aff'd 294 F.2 957 (1 Cir. 1961). *Cf. Connecticut Company* v. *Div. 425, etc.*, 147 Conn. 608, 164 A.2 413 (1960).

[7] Compare cases cited in footnote 3 *supra*.

in this court and before the court below on a theory wholly inconsistent with such a contention.

Very recently we had occasion to reverse the summary judgment granted by a trial court because it failed to take into account a determinative factual issue concerning possible contract termination in reference to the obligation to arbitrate.[8] It was said:

> "More particularly the question is raised as to whether a notice of termination had been sent to the plaintiff as contemplated in the contract. Thus there remains the very real question whether there is any contract at all, and this is a matter plaintiff asked in its pleading to have decided. It would seem advisable under these circumstances that this question be decided by the trial court as this will decide whether there is in existence an agreement to arbitrate. We cannot require the contractual 'remedy' to be resorted to until the issue before the court as to its very existence is settled."

Here there is no factual problem involved, for it is uncontroverted that a definite notice of termination was given as authorized by the collective bargaining agreement. Its legal effect is purely a question of law for the courts.

It is elementary that in construing a contract effect, if possible, should be given to all of its terms. A consideration of the entire collective bargaining contract before us lends support to our interpretation of the provisions directly involved. If each part is given effect, the agreement between the parties is reasonable and unified. Within the ninety day period specified either party could give notice of termination, for it was neither agreed nor required that they should be bound to each other in perpetuity or indefinitely solely at the will of future arbitrators. Since there was such notice of termination the contract had come to an end upon the expiration of the old term. To say that the obligation to arbitrate new terms and conditions would continue with the same result as if the contract were not so terminated would

[8] *United Mine Workers of America, District 22* v. *Roncco*, 314 F.2 186 (10th Cir. 1963).

be to deny any effect whatever to the right of termination which each party reserved.

But if effect is to be given as indicated to the termination provision, all other parts of the contract fall neatly into place. The notice within the ninety day period may be either of "intention to terminate or to negotiate changes in its terms." (Article 43, Section 1 of contract). If the contract is not terminated and if no changes are demanded, it is automatically renewed for another year. If it is not terminated but if within the ninety day period specified in the contract there is notice given of intention to negotiate changes in the terms of the contract, Article 43 provides for collective bargaining and other efforts to arrive at the changes for the new term (Sections 1 and 2) until (as provided by Section 3) there has been agreement on the changes or an agreement to arbitrate. If there is no agreement on the merits or no agreement to arbitrate, then the provision concerning mandatory arbitration contained in Article 7 comes into operation with respect to "changes, additions or modifications (Sec. 1), including new or changed conditions . . . for the contract year following the year covered by this agreement." (Article 8). As thus construed the contract seems not only logical but sensible. If not so construed, it would be contradictory and in some respects unintelligible.

The contract, including any obligation to arbitrate new terms and conditions for a renewed period, was terminated by the union lawfully, in accordance with the expressed intent of the parties and consistently with the Labor-Management Relations Act.

REVERSED.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 5429-Civil

DIVISION NO. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,

Plaintiff

v.

M. K. & O. TRANSIT LINES, INC.,

Defendant.

OPINION

Before:

LUTHER BOHANON, *United States District Judge.*

This is an action brought under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. Section 185, commonly known as the "Taft Hartley Act," regarding a refusal by the defendant to arbitrate under a collective bargaining agreement between the parties.

Both parties have moved for Summary Judgment.

The plaintiff Union and the defendant Corporation entered into a labor agreement on the 24th day of July, 1959, for a term extending until June 30, 1962.

Article 43, Section 1 of the Labor Agreement, provides:

> "This Agreement shall be in effect from July 1, 1959 to June 30, 1962, both inclusive, and from year to year thereafter, except that at the expiration of the contract term or any renewal thereof either party may terminate the Agreement by giving notice to the other party of its intentions to terminate the Agreement or to negotiate

changes in its terms. Notice of the intention of either party to terminate the contract or negotiate changes in its terms shall be in writing and be delivered to the other party not more than ninety (90) and not less than sixty (60) days before the expiration of the contract term or any renewal thereof. If such notice is given by either party, it shall also contain an offer to meet and confer with the other party for the purpose of negotiating a new contract."

In accordance with the requirements of Article 43, supra, plaintiff, on April 27, 1962, gave notice to the defendant of the Union's desire to negotiate "changes, additions, modifications, deletions and whatever the case may be in the terms of a new contract . . ."[1]

---

[1] "April 27, 1962

Mr. W. P. Hicks, Vice-Pres.
M. K. & O. Transit Lines, Inc.
319 South Cincinnati
Tulsa, Oklahoma

Dear Mr. Hicks:

As provided in the existing Agreement by and between the M. K. & O. Transit Iines, Inc., and Division Number 892 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, and in accordance with the existing laws this is the official notice of this Division's desire to negotiate changes, additions, modifications, deletions and whatever the case may be in the terms of a new contract by and between M. K. & O. Transit Lines, Inc., and this Division.

In the event that no agreement has been reached by midnight of June 30, 1962, and if arbitration has not been agreed upon this will also serve due notice that the entire contract now in effect is to be terminated as of, midnight June 30, 1962.

The Officers of this Division are ready and willing to meet and treat with the Representatives of the Company for the purpose of negotiating a new contract on a date and at a place that is agreeable to both parties.

Yours very truly,
/s/ C. E. WILSON
C. E. Wilson, Pres.
Division No. 892
/s/ T. A. WILKINS
T. A. Wilkins, Fin.-Sec.
Division No. 892

CEW/pls
oeiu #330
afl-cio"

The parties thereafter met and attempted to negotiate the terms of the new or changed contract, but were unable to reach an agreement. There is nothing in the record to indicate that the parties did not negotiate in good faith.

Failing to reach an agreement on the request or demand for changes in the contract, plaintiff, on June 20, 1962, made a demand upon the defendant for arbitration of their differences, as provided by Article 7 of the Agreement.[2]

---

[2] "ARTICLE 7
ARBITRATION AND ARBITRATION PROCEDURES

SECTION 1. All grievances, disputes and differences between the UNION and COMPANY including changes, additions and modifications to any agreement which cannot be resolved by negotiations between the two parties, shall be determined by arbitration as hereinafter provided:

First: Within five (5) days after either party shall have duly served a demand for arbitration upon the other party, each party shall:

(a) Appoint one person to serve as its member of the Board of Arbitration.

(b) Notify each other of such appointment in writing.

Second: The arbitrators so appointed by the Union and the Company shall meet within five (5) days and endeavor to settle the dispute in question. If they fail to do so in a single conference, they shall proceed as quickly as possible to select a third arbitrator, who, when so selected and appointed, shall act as Chairman of the Board of Arbitration. In the event the two arbitrators fail to agree upon a third arbitrator within five (5) days after the adjournment of the conference as above referred to, they shall request the Director of Federal Mediation and Conciliation, U. S. Department of Labor, to submit a list of five (5) names of arbitrators from which the parties shall select their third arbitrator. Within five (5) days after receiving such list, the parties shall each strike two names from the list in the following manner: The Union shall strike one name and the Company shall strike a second name. The Union shall then strike a third name and the Company shall strike a fourth name. The person thereafter remaining on the list, shall be and become the third arbitrator.

The Board of Arbitration shall meet and organize in Tulsa, Oklahoma, within thirty (30) days after the third arbitrator was so selected and shall continue to meet every day and hear any and all

The defendant declined and refused to arbitrate in accordance with the requirements of Article 7 of the Labor Agreement, and this action was commenced on June 29, 1962, prior to the expiration of the Labor Agreement, to compel specific performance of the arbitration provisions of the contract.

It should be noted also that the contract provided against strikes and lock-outs.[3]

The defendant contends:

(a) That this Court has no jurisdiction over this defendant and this action.

(b) That it has complied with the provisions of the contract and that it is under no obligation to arbitrate terms of a new contract.

(c) That the Union's letter of April 27, 1962 terminated the contract as of midnight June 30, 1962, and plaintiff thereby terminated any right to enforce arbitration.

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evidence and arguments related to the case and shall render a decision in writing to both parties within ten (10) days. All arbitration proceedings shall be held in Tulsa, Oklahoma.

The decision of a majority of the Board of Arbitration shall become final and binding on both parties when delivered to them in writing.

The parties shall pay the fees and expenses of its own arbitrator. The fees and expenses of the third arbitrator as well as other joint expenses incidental to the arbitration shall be paid equally by the parties.

SECTION 2. The time limits set forth in this Article shall exclude Saturdays, Sundays and holidays."

[3] "ARTICLE 8
STRIKES AND LOCK-OUTS

SECTION 1. It is agreed by the parties that there shall be no strike by the ASSOCIATION, nor lock-out by the COMPANY during the life of this Agreement. Since it is likewise the intent of the parties that arbitration will be resorted to in the event no agreement on grievances, new or changed provisions is reached for the contract year following the year covered by this Agreement or any extension of it, it is agreed that during such periods of negotiations or arbitration proceedings there will be no strike or lock-out."

(d) That the plaintiff charges the defendant of an unfair labor practice in violation of 29 U.S.C.A. Section 158 (a)(5), and therefore only the National Labor Relations Board has jurisdiction to hear the complaint, and finally that any attempt to force defendant to submit to arbitration violates defendant's rights under the Fifth Amendment.

The Union's proposal for a new contract, Exhibit C to defendant's Answer, requests many changes not in the existing contract, including vacation time, pay for holidays, increased hourly wages, and for a comprehensive group insurance coverage. There are other changes and modifications proposed, but I do not feel that it would be beneficial or helpful to enumerate each proposed change, addition or modification.

Counsel for the respective parties have furnished the Court excellent briefs in support of their respective contentions.

The Court is of the opinion that it has jurisdiction to determine this controversy by virtue of Section 301 of the Labor Management Relations Act, 29 U.S.C.A. 185, as interpreted by the Supreme Court and lower federal Courts. In *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, decided June 3, 1957, involving a controversy of grievances under a collective bargaining agreement concerning workloads and work assignments of the Union members, the Union requested arbitration and the employer refused. The Court, at page 451 of the opinion, says:

> "From the face of the Act it is apparent that Section 301 (a) and Section 301 (b) supplement one another. Section 301 (b) makes it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301 (b) in other words provides the procedural remedy lacking at common law. Section 301 (a) certainly does more than that. Plainly it supplies the basis upon which the federal district courts may take

jurisdiction and apply the procedural rule of Section 301 (b)."

The Court then goes ahead to say:

"The question then is, what is the substantive law to be applied in suits under Section 301 (a)? We conclude that the substantive law to apply in suits under Section 301 (a) is federal law, which the Courts must fashion from the policy of our national labor laws."

And at page 457:

"It is not uncommon for federal courts to fashion federal law where federal rights are concerned. See Clearfield Trust Company v. United States, 318 U.S. 363, 366-367; National Metropolitan Bank v. United States, 323 U.S. 454. Congress has indicated by Section 301 (a) the purpose to follow that course here. There is no constitutional difficulty. Article III, Section 2, extends the judicial power to cases 'arising under . . . the laws of the United States.' The power of Congress to regulate these labor management controversies under the commerce clause is plain. Houston and Texas Railway Company v. United States, 234 U.S. 342; Labor Board v. Jones and Laughlin Corporation, 301 U.S. 1. A case or controversy arising under Section 301 (a) is one within the purview of judicial power as defined in Article III."

And at page 458 the Court said:

"The Congressional policy in favor of enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of Section 7 of the Norris-LaGuardia Act."

Later the Supreme Court on June 20, 1960, decided three cases respecting arbitration clauses in labor agreements. These decisions, *United Steel Workers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574, *United Steel Workers of America* v. *American Manufacturing Company*, 363 U.S. 554, and *United Steel Workers of America* v. *Enterprise Wheel and Car Corporation*, 363 U.S. 593, support the proposition that an order to arbitrate grievances should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of

an interpretation that covers the asserted dispute, and all doubts should be resolved in favor of coverage. In the *Warrior and Gulf* decision, at page 582, the Court said:

> "The Congress, however, has by Section 301 of the Labor Management Relations Act, assigned the Court the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with Congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."

Thus from the decisions above quoted, the power of the Courts to enforce provisions of labor contract for arbitration is not violative of Article III, Section 2 of the Constitution, and that the Courts, in a proper case, should take jurisdiction of and decide a case under Section 301 and fashion its decree according to federal law as expressed by the Courts and Congressional policy.

With these pronouncements from the Supreme Court, this Court should construe Article 7, Section 1 of the Labor Agreement in the case at bar which provides:

> "All grievances, disputes and differences between the Union and Company, including changes, additions and modifications to any agreement which cannot be resolved by negotiations between the two parties, shall be determined by arbitration as hereinafter provided:"

The other provisions of Article 7 are set forth in footnote 2.

This arbitration clause is clear and unambiguous; at least, the parties to this action do not contend that there is any ambiguity in the clause. The Court must assume that the parties knew the meaning and purport of the language used in this Article. To me it simply means that if a dispute arises as to any grievance or with respect to changes,

additions or modifications to the contract, the parties must submit to arbitration if they cannot otherwise resolve their differences by negotiations.

The defendant asserts what I think to be an untenable defense; that is, that the Union's right to demand arbitration expired by reason of the notice of termination contained in the letter shown in full in footnote 1. It should be noted that the Union, by this letter dated April 27, 1962, more than 60 days before the expiration of the contract, gave notice to the defendant of its desire "to negotiate *changes, additions, modifications, deletions* and whatever the case may be in the terms of a new contract. . . ." And the letter further offered to meet with representatives of the company for the purpose of negotiating a new contract. Negotiations having failed, the Union demanded arbitration, and the Company refused to arbitrate. These demands of the Union and the refusal of the Company all took place while the contract was in force and effect and in accordance with the terms of the contract, except the defendant's refusal to arbitrate, which it was obliged to do.

The right to arbitration does not expire with the expiration of the labor contract. *United Steel Workers* v. *Enterprise Wheel and Car Corporation*, 168 F. Supp. 308, affirmed 363 U.S. 593; *Botany Mills, Inc.* v. *Textile Workers Union of America*, 50 N. J. Super. 18, 141 A. 2d 107; *Potoker* v. *Brooklyn Eagle*, 2 N. Y. 2d 553, 141 N. E. 2d 841, cert. denied 355 U. S. 883. However, the matters in dispute in the case at bar arose during the term of the Labor Agreement.

Defendant, in paragraph 5 of its Answer, says:

> "That this Court has no jurisdiction under the statutes of the United States and particularly under Title 29, U.S.C. 185, to order this defendant to abdicate its right to bargain and turn over the negotiations of a new contract to arbitrators, *regardless of the provisions of said labor agreement.*" (Emphasis provided.)

The defendant by the underscored statement tacitly admits

that the provisions of the Labor Agreement mean exactly what I have heretofore indicated.

The contention of the defendant is that it was not required by the contract to negotiate a new agreement, but this is precisely what the defendant agreed to do. Any change, addition or modification of an agreement constitutes a new agreement, especially as to those provisions of the agreement which have been changed or modified.

In presenting this matter to the Court, the defendant relies principally upon *Boston Printing Pressmen's Union* v. *Potter Press*, 141 F. Supp. 553, 241 F. 2d 787 (1 Cir.). This case is not in point and is at odds with the rulings of the Supreme Court, supra. The Court refused to follow Section 301, supra, but based its decision on the provisions of the United States Arbitration Statute, saying:

> "We agree with the district court that, assuming the Constitutionality of a statute under which the Congress, with its eyes open, might authorize the federal Courts to enforce legislative awards of arbitrators, nevertheless 'the United States Arbitration Statute does not seek to reach the Constitutional limit, but is concerned only with the enforcement of quasi judicial awards directed in the ascertainment of facts in a past controversy . . .'"

This Court has the power to enforce the arbitration provisions of the contract in question even though such enforcement establishes future labor conditions, and to shape its decree to meet the existing circumstances.

Plaintiff's Motion for Summary Judgment is granted.

Defendant's Motion for Summary Judgment is denied.

DATED this 8 day of November, 1962.

/s/ LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 5429-Civil

DIVISION NO. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,

Plaintiff,

v.

M. K. & O. TRANSIT LINES, INC.,

Defendant.

NOBLE C. HOOD, *Clerk, U.S. District Court*

ORDER

NOW on this 8 day of November, 1962, IT IS HEREBY ORDERED that plaintiff's Motion for Summary Judgment is granted. The defendant's Motion for Summary Judgment is denied. The defendant is ordered to proceed within ten (10) days from this date to arbitration, as prayed for in the Complaint, and in accordance with Article 7 of the Labor Agreement between the parties set forth in the Complaint and in the Opinion of the Court.

/s/ LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
OCT 28 1963
JOHN F. DAVIS, CLERK

In The Supreme Court of the United States

October 1963 Term

No. 501

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DIVISION NO. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR-COACH EMPLOYEES OF AMERICA, Petitioner,

versus

M.K.& O. TRANSIT LINES, INC., Respondent.

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October 26, 1963

SOUTHERN PTG. — TULSA

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Oil Workers Int. Union, Loc. No. 463 v. *Texoma Natural Gas Co.*, 146 F. 2d 62 (5th Cir. 1945) 10 n.13

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System Federation No. 59 of Ry. Employees Dept. of Amer. Federation of Labor v. *Louisiana & A. Ry. Co.*, 30 F. Supp. 909 (W.D.La. 1940) 10 n.13

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Hughes, *Address to American Law Institute* (May 10, 1934), 11 A.L.I. Proceedings 313 (1934) 11 n.15

Vinson, *Address to American Bar Association* (Sept. 7, 1949), 69 S.Ct. V (1949) 11 n.15

In The Supreme Court of the United States

October 1963-Term

No. 501

DIVISION NO. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, Petitioner,

versus

M.K.& O. TRANSIT LINES, INC., Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported officially at 319 F. 2d 488, (10th Cir. 1963).

The opinion of the United States District Court for the Northern District of Oklahoma is reported officially at 210 F. Supp. 351 (N.D. Okla. 1962).

QUESTION PRESENTED

Respondent submits that neither of the questions stated by Petitioner is presented in this case. The only question arising out of the disposition of the case by the Court of Appeals which could be presented is whether that court was correct in holding that the contract embodying the agreement to arbitrate the terms of a new contract was terminated.

STATUTORY PROVISION INVOLVED

In addition to that cited by Petitioner, 29 U.S.C., § 158(d), is relevant and is set out in the Appendix, *infra*, p. 1a.

STATEMENT OF THE CASE

Respondent M.K.& O. Transit Lines, Inc., submits the following statement of the case.

On June 24, 1959, Petitioner and Respondent entered into a written collective bargaining contract which set forth wages and general working conditions for a primary term from July 1, 1959, to June 30, 1962, and from year to year thereafter *unless terminated by either party as therein provided.*

On April 27, 1962, pursuant to the terms of the aforesaid contract, and in compliance with the notice requirements of the Labor-Management Relations Act, 29 U.S.C., § 158(d), Petitioner notified Respondent that it desired to negotiate a new contract and further that if a new contract were not agreed upon by midnight, June 30, 1962, the entire contract would then be terminated.[1]

[1] The pertinent part of the letter stated:

> In the event that no agreement has been reached by midnight of June 30, 1962, and if arbitration has not been agreed upon this will also serve due notice that the *entire contract now in effect is to be terminated* as of midnight June 30, 1962." (Emphasis supplied.) (R.13.)

The letter of termination was submitted in accordance with Petitioner's right to so terminate the contract under Article 43 thereof, which provides:

> SECTION 1. This agreement shall be in effect from July 1,

On June 20, 1962, Petitioner requested that its demands for a new contract be determined and fixed by arbitration. Respondent, by letter dated June 25, 1962, rejected the request for arbitration, because, *inter alia*, Petitioner had given notice to terminate the entire contract as of June 30, 1962, in consequence of which the provisions of that contract would no longer be in effect.

On June 29, 1962, Petitioner filed its Complaint in the United States District Court for the Northern District of Oklahoma seeking a judgment of the court to compel Respondent to arbitrate Petitioner's demands for a new contract. Both parties filed motions for summary judgment. On November 8, 1962, the trial court issued its order granting Petitioner's motion for summary judgment and ordering the parties to proceed to arbitration. The court based its order and opinion on the conclusion that as a matter of law and fact the Petitioner could not terminate the contract.[2]

1959 to June 30, 1962, both inclusive, and from year to year thereafter, except that *at the expiration of the contract term* or any renewal thereof *either party may terminate the Agreement* by giving notice to the other party of its intentions to terminate the Agreement or to negotiate changes in its terms. Notice of the intention of either party to terminate the contract or negotiate changes in its terms shall be in writing and be delivered to the other party not more than ninety (90) and not less than sixty (60) days before the expiration of the contract term or any renewal thereof. If such notice is given by either party, it shall also contain an offer to meet and confer with the other party for the purpose of negotiating a new contract." (Emphasis supplied.)

[2] "The Court [Bohanon, J.] . . . they [Union] didn't have any right to terminate it. If you would get together and if you had agreed on termination, why you would be all right, but there was no agreement that you would terminate it. *They [Union] had no more right to terminate it than you [M.K.&O.] did.* You had no

Respondent filed its Notice of Appeal on November 21, 1962, and, upon hearing, the Court of Appeals for the Tenth Circuit entered its judgment on May 31, 1963, reversing the order of the district court. The Court of Appeals decided only one question, to-wit: whether the contract was terminated in accordance with the labor agreement and in accordance with appropriate statutory authority. It held that the letter of April 27, 1962, terminated the Labor Agreement.[3] The court did not reach or decide

more right to terminate it than they did. The letter just — *I don't care what they said in that letter. . . .*" (Emphasis supplied.) (R. 41.)

[3] "While the union now seeks to dismiss the letter of termination as perhaps an indiscreet, but meaningless gesture, no one has questioned that the president of the union who wrote the letter had authority to act for the union pursuant to the contract. Nor can it be questioned reasonably that he did so act to terminate the contract on behalf of the union. The notice was given within the time and in a manner consistent with both the contract of the parties and the Labor-Management Relations Act. There could have been *reasons then valid for* so doing. The union thus could have hoped to avoid the risk of being in the very position it asserts the employer is in now—being bound to arbitrate a future contract as a substitute for the collective bargaining process. Be this as it may, by terminating the contract as it had the right to do, the union relieved itself of the consequences that would have resulted if the collective bargaining agreement had not been terminated. It also relieved the employer of those consequences.

. . . . . .

"The contract, including any obligation to arbitrate new terms and conditions for a renewed period, *was terminated by the union lawfully, in accordance with the expressed intent of the parties and consistently with the Labor Management Relations Act.*" (Emphasis supplied.) (*M.K.& O. Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, 319 F. 2d 488, 491-92 (10th Cir. 1963).)

other questions raised in the trial court and presented on appeal.

REASONS FOR DENYING THE WRIT

THE ONLY QUESTION ARISING FROM THE DECISION OF THE COURT OF APPEALS—WHETHER THE GOVERNING CONTRACT AND THE PROVISIONS EMBODIED THEREIN RELATIVE TO THE ARBITRATION OF A NEW CONTRACT WERE TERMINATED—IS NOT SUCH A QUESTION AS WOULD WARRANT OR SUPPORT THE GRANTING OF A WRIT.

Petitioner asserts that two questions are here presented for review: (1) arbitration of a new collective bargaining agreement is specifically enforceable, and (2) anticipatory repudiation of a collective bargaining agreement does not affect arbitration. Neither of these issues were resolved by the Court of Appeals and are therefore not at issue before this Court. The first of these questions purports to involve the enforceability of an agreement to arbitrate the terms

> "[W]e do not reach the question of the court's authority or jurisdiction to require such arbitration. It may well be on the latter question that the rationale of the decision in the Potter Press case [*Boston Printing Pressmen's Union v. Potter Press*, 141 F. Supp. 553 (Mass. 1956), *aff'd*, 241 F. 2d 287 (1st Cir. 1957), *cert. denied*, 355 U.S. 817 (1957)] should be reappraised in the light of subsequent decisions of the Supreme Court. Our resolution of this important problem, however, should await a case in which it is squarely presented, and it is not squarely presented in this case. *Indeed, it is not presented here at all for the renewable term of the contract in connection with which it might have arisen was foreclosed unequivocally and effectually by the union's notice of termination.*" (Emphasis supplied.) (Footnotes omitted.) (*M.K.&O. Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, 319 F. 2d 488, 490 (10th Cir. 1963).)

of a new contract under Section 301 of the Labor-Management Relations Act.[4] That question was not reached or passed upon by the Court of Appeals because of its determination that the contract had been terminated. That court took cognizance of the Petitioner's contention concerning the question and stated expressly its reasons for not passing upon it.[5]

Respondent therefore respectfully urges that Petitioner's statement that this Court should hear this case in order to resolve the conflicting views of the federal court concerning arbitration of a new contract is erroneous. This issue was not resolved by the Court of Appeals. It does not present an important, well-litigated area of labor law. There is no substantial conflict among the federal courts and no diversity of opinion among the courts of appeals. Certiorari should therefore be denied.

Petitioner's statement of the second question allegedly presented is a patent effort to evade and avoid the Union's unequivocal and effectual notice to terminate. Petitioner here refers to it as an "anticipatory repudiation." Having terminated the contract, as found by the Court of Appeals, all that remains of Petitioner's second question is whether the provisions in respect to the arbitration of the terms of a new contract survived the termination of the entire contract. However, Petitioner does not elsewhere assert or elaborate on this proposition in its Petition. Those cases holding that arbitration clauses in respect to grievances arising during the effective term of the contract survive

[4] 29 U.S.C., § 185(a).

[5] See n.4, p.5.

termination are not relevant to the instant case.[5] The same is true in respect to the statement that the "anticipatory repudiation" was "retracted." There is nothing in the record that raises or presents such a question. In any case the holding of the Court of Appeals ruled upon and disposed of the matter adversely to Petitioner.

The record in the trial court makes it abundantly clear that the trial judge was laboring under the erroneous impression that federal law deprived the contracting parties of the right of either one of them to effect a termination of their contract. *There is no such federal law or federal policy and none has been cited.* It was for this reason that the trial court's decision was reversed, and the Court of Appeals held that Petitioner had terminated the entire contract.

[5] As the Court of Appeals said in reference to this problem:

> "The cases cited by the union to support its claim that the obligation of arbitration survived the notice of termination are not in point. In those cases the sustained arbitration was with reference to accrued though continuing rights under the terminated agreement and did not concern the terms of any new agreement."

* * * * * * *

> "See for example United Steelworkers of America v. Enterprise Wheel & Car Corp., D.C.S.D.W.Va., 168 F.Supp. 508 (1958), modified and remanded, 269 F.2d 327 (4th Cir. 1959), aff'd with modifications, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); and General Tire & Rubber Co. v. Local No. 542, etc., 191 F.Supp. 911 (D.C.R.I. 1961), aff'd 294 F.2d 957 (1st Cir. 1961). Cf. Connecticut Company v. Division 425, etc., 147 Conn. 608, 164 A.2d 415 (1960); *CMK & O Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, 319 F.2d 488, 491 (10th Cir. 1963)."

Obviously Petitioner has now abandoned this position in favor of what is now termed "anticipatory repudiation."

Petitioner now contends that the letter of April 27, 1962,[9] was an "anticipatory repudiation" of the labor agreement between the parties and that the Court of Appeals so determined (Pet. p.10). This contention is false. The issue of "anticipatory repudiation" was not argued by Petitioner or Respondent in either of the two lower courts and was not determined by the Court of Appeals.[9] This belated characterization of the termination letter is nothing more than an attempt to avoid and evade the unequivocal and effectual termination of the agreement found by the Court of Appeals. The instant case involved only an interpretation of Article 43 of the labor agreement,[10] and the Petitioner's letter of termination in accordance therewith.[11]

The Court of Appeals held and decided that the Petitioner had terminated the entire contract in accordance with its letter of April 27, 1962, and in compliance with the rights granted to it by Article 43 of the labor agreement. Even a cursory examination of the opinion by Christensen, D.J., demonstrates that the issue was one of termination and not "anticipatory repudiation." It becomes clear then that

[9] See n 1, pp 2-5.

[9] It was not until the petition for rehearing *en banc* that Petitioner sought to change the issue of *termination* to one of *anticipatory repudiation*. That petition was denied on July 1st, 1965, without opinion. The Court of Appeals noted in this connection and on the record then before it that "the union now seeks to dismiss the letter of termination as perhaps an indiscreet and meaningless gesture." (*M.K.&O. Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* 349 F. 2d 488, 491 (10th Cir. 1965).)

[10] See n 1, pp 2-5.

[11] See n 1, pp 2-5.

Petitioner seeks to have this Court resolve an issue which was not determined by, nor for that matter even argued before, the Court of Appeals. It is for this reason that Respondent respectfully takes issue with the Petitioner's statement of questions presented and the unsupported conclusions found in footnote 12, page 11, of the Petition.[12] The Court of Appeals decided only that Petitioner had the right to terminate the contract and in fact did so terminate. The record discloses that no attempt was ever made (assuming that such an attempt would be legally effective) to retract the termination letter.

It thus becomes amply clear that the reliance by Petitioner upon the case of *Drake Bakeries* v. *Local No. 50*, 370 U.S. 254 (1962), is untenable. That case, as Petitioner clearly points out (Pet. pp. 11-12), involved the issue of whether the union had lost its right to arbitrate grievance disputes by breaching a no-strike clause. No issue of termination was

[12] Every case therein cited, with but one exception, involved breach or repudiation of one or more clauses of an agreement during the effective term of the agreement. None involved termination of an agreement on its anniversary date in accordance with an absolute right to terminate granted by the agreement itself. The cases are therefore irrelevant to the decision sought to be reviewed—termination of a collective bargaining contract in accordance with its terms. The case of *Local 181, Int'l Union of Operating Engineers* v. *Dalton Construction Co.*, 195 F.2d 350 (6th Cir. 1952), is also irrelevant because the collective bargaining contract therein provided that *neither party could terminate the agreement* except by executing a new agreement. In addition no notice of termination was given and no issue of arbitration was involved.

The issue of retraction is equally irrelevant since in fact Petitioner and Respondent were required by law to continue to observe the terms of the labor agreement until June 30, 1962 (the termination date), 29 U.S.C. § 158(d). Thereafter the agreement, being terminated, was not observed and no facts in the Record demonstrate otherwise.

there considered or decided by this Court. That being so, the decision of the Court of Appeals in the instant action, by necessity, could not and does not conflict with the decision of this Court in the *Drake Bakeries* case. No authority holds that a labor agreement may not be terminated in accordance with its terms.[13] The cases cited by Petitioner (Pet. pp. 11-12) do not relate to the issue of termination, nor do they relate to the issue of arbitration of the terms and conditions of a new contract. The Petition is misleading because Petitioner has misconceived the question presented in the case and misconstrued the opinion of the Court of Appeals. The Court of Appeals did not ignore the decision in the *Drake Bakeries* case; the case was cited in the brief of Petitioner and argued orally. Had there been a breach of the labor agreement rather than a termination thereof by the moving party, then Petitioner's arguments might have some relevance. As it is, it presents no valid reason for the granting of a writ of certiorari.[14]

This being so, it is respectfully urged that the writ should be denied because there is no conflict with the *Drake Bakeries* case and Petitioner has presented no other reason as to why this Court should review the determination that the labor agreement was terminated in accordance with its terms.

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[13] See: *Oil Workers Int. Union, Loc. No. 463 v. Texoma Natural Gas Co.*, 146 F. 2d 62 (5th Cir. 1945); *System Federation No. 59 of Ry. Employees Dept. of Amer. Federation of Labor v. Louisiana & A. Ry. Co.*, 50 F. Supp. 909 (W.D. La. 1940); *Paterson Parchment Paper Co. v. Int. Brotherhood of Paper Makers*, 191 F. 2d 252 (3d Cir. 1951).

[14] It is interesting to note the Petitioner makes no claim that the issue of termination of the labor agreement should be reviewed by this Court.

Petitioner has tacitly recognized that the normal reasons for the granting of such a petition do not exist in this case.[15] In fact the question of termination relates to this particular contract and the interpretation placed upon Article 43 by the Court of Appeals. The question additionally relates to the meaning and factual surroundings of Petitioner's notice of termination on April 27, 1962. Far from being a fully litigated question of public law, important to large numbers of people, the resolution of this case depends upon this peculiar set of facts.

In addition Petitioner has cited no cases (and indeed it could not have, since none exist) demonstrating a conflict between the circuit courts or between this decision and decisions of this Court relating to termination. It is therefore urged that the Petition be denied.

[15] 28 U.S.C.A. (1962 Supp.) S.Ct. R.19; *Layne & Bowler Corp.* v *Western Well Works*, 261 U.S. 387, 393 (1923); *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949); Hughes, *Address to American Law Institute* (May 10, 1934), 11 A.L.I. Proceedings 313 (1934); Vinson, *Address to American Bar Association* (Sept. 7, 1949), 69 S.Ct. V (1949).

CONCLUSION

For the reasons herein stated, the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted.

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October 26, 1963

APPENDIX

29 U.S.C., § 158(d), provides as follows:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, that where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any

State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be re-opened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Emphasis in original.)